(6)

No. 84-1274

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Petitioner
v.

DIMENSION FINANCIAL CORPORATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS DIMENSION FINANCIAL CORPORATION, *ET AL.*

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THE QUESTIONS PRESENTED

The Bank Holding Company Act of 1956, as amended, uses the term "bank" to circumscribe the scope of the Federal Reserve Board's jurisdiction under that Act. A covered "bank" is defined in the Act to include a financial institution only if it both "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c) (1982).

The questions presented by this case are whether the court of appeals correctly concluded that the Federal Reserve Board exceeded its authority under the Act when the Board amended its implementing Regulation Y to expand the definition of a BHCA "bank" and thus the Board's jurisdiction by:

(a) redefining the statutory "legal right to withdraw on demand" requirement to include "any deposit with transactional capability that, as a matter of practice, is payable on demand;" and

(b) redefining the statutory "commercial loan" requirement to include the "purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest-bearing funds."

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STATEMENT

This case concerns the Congressional allocation of jurisdiction among various federal and state agencies to regulate financial institutions and, in particular, the scope of jurisdiction granted the Board of Governors of the Federal Reserve System ("Board") under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (1982) ("BHCA" or "Act"). The Board's regulation implementing the Act is Regulation Y, 12 C.F.R. Part 225 (1985). This case arises from challenges by respondent Dimension Financial Corporation ("Di-

mension")[1] and other aggrieved parties to the Board's 1983 revision of Regulation Y to fundamentally alter its jurisdiction under the Act.[2]

The Bank Holding Company Act represents one—but only one—segment of the carefully wrought framework developed by Congress for the regulation of financial institutions. Different types of institutions are subject to varying regulatory schemes and requirements, which are administered by agencies at both the federal and state level. The Office of the Comptroller of the Currency ("Comptroller") charters and comprehensively regulates national banks under the National Bank Act and related statutes. 12 U.S.C. §§ 21-216 (1982). The Federal Deposit Insurance Corporation ("FDIC") is responsible for insuring and overseeing the financial soundness of national banks, savings banks, and other qualified institutions. 12 U.S.C. §§ 1811-1832 (1982). Congress gave another agency, the Federal Home Loan Bank Board, responsibility to charter and regulate federal savings and loan associations, which are then insured by the Federal

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[1] Dimension is a holding corporation that has sought approval from the Office of the Comptroller of the Currency to establish and operate 31 new national banks in 25 states. *See* Statement of Corporate Affiliations, Joint Brief of Respondents in Opposition to Petition for Certiorari (March 7, 1985). Pursuant to Supreme Court Rule 28.1, Dimension states that its affiliate, Valley Federal Savings & Loan Association of Hutchinson, Kansas, has become affiliated with Interstate Federal Corporation.

[2] The Board's brief on the merits is cited here as "Pet. Br.," the Joint Appendix as "J.A.," and the Appendix to the Board's petition for certiorari as "Pet. App." The Documentary Supplement filed with respondents' joint brief in opposition to the petition is cited as "Rspt. Doc. Supp." The Board proposed its amendment to Regulation Y at 48 Fed. Reg. 23520 (May 25, 1983), published the final amendment at 49 Fed. Reg. 794 (Jan. 5, 1984), and published its Supplementary Information Appendix A to justify the amendment it had made at 49 Fed. Reg. 833-842 (Jan. 5, 1984).

Savings & Loan Insurance Corporation ("FSLIC").[3] Other federal agencies regulate specific activities of financial institutions, such as securities and options trading, and certain investment advice and investment banking activities. Finally, Congress has preserved the authority of states to charter and regulate such institutions as industrial banks, and state banks and savings and loans.[4]

As part of this framework, the Bank Holding Company Act grants the Board regulatory jurisdiction over companies that own "banks." Not all banks, however, are considered "banks" under the BHCA (hence the term "non-BHCA banks" or "nonbank banks"). For purposes of this jurisdictional grant, Congress defined "bank" as an institution that *both* receives "deposits that a depositor has a legal right to withdraw on demand" *and* "engages in the business of making commercial loans." BHCA § 2(c), 12 U.S.C. § 1841(c).

In December 1983, the Board adopted an amendment to Regulation Y that dramatically expanded the scope of its jurisdiction by redefining both components of the statutory BHCA "bank" definition. 49 Fed. Reg. 794 (Jan. 5, 1984). In particular, the Board redefined the "commercial loan" component to sweep in institutions that engage in passive investment activities such as money market and interbank transactions, including:

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[3] 12 U.S.C. § 1437 *et seq.* (1982); 12 U.S.C. § 1421 *et seq.* (1982); 12 U.S.C. § 1461 *et seq.* (1982); 12 U.S.C. § 1724 *et seq.* (1982).

[4] "Financial firms or transactions are subject to an exceedingly complex jurisdictional web in which authority is shared among seven primary federal regulatory agencies, hundreds of state and local agencies, and many special purpose organizations." *Blueprint For Reform: The Report of the Task Group on Regulation of Financial Services*, 8 (1984), *reprinted in* Fed. Banking L. Rep. (CCH) No. 1050 (Nov. 16, 1984). *See generally* W. Schlichting, *et al.*, 1 *Banking Law* §§ 2.03, 3.02 (1985); 14 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 6802, 6804 (perm. ed. 1980).

[T]he purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest-bearing funds.

12 C.F.R. § 225.2(a)(1)(1985). Before the amendment, Regulation Y had directly incorporated the statutory definition of a "bank," 12 C.F.R. § 225.1 (1983), and these activities had never been considered "commercial lending." Similarly, to extend BHCA jurisdiction to institutions that offer "NOW" accounts and other transactional accounts, the Board redefined the "legal right to withdraw on demand" component of the statutory "bank" definition to mean "any deposit . . . that, as a matter of practice, is payable on demand." 12 C.F.R. § 225.2(a)(1)(1985).

The consequences of the Board's proposed expansion of its jurisdiction would be dramatic both for coordinate regulatory bodies and for the affected institutions. For example, the Board's assertion of authority would overlap or intrude upon the Comptroller's authority to regulate the activities of national banks under the National Bank Act, and would force state-chartered institutions to terminate their existing deposit insurance in favor of FDIC insurance. *See* Rspt. Doc. Supp., Add. I; Pet. App. 44a. In addition, companies that owned banks or other financial institutions that would now be newly denominated as BHCA "banks" could no longer own or engage in most other types of nonbanking businesses, and they would also become subject to additional limitations on the acquisition of other banks. 12 U.S.C. §§ 1842, 1843(a), 1843(c)(8). As the court below concluded in describing the "pervasive changes" the Board's redefinition would cause:

[T]his expansion of jurisdiction was very much more than just the prevention of future acquisitions, arrangements or affiliations. It was to cause divestitures of old acquisitions, sale of assets, changes in permitted uses of excess funds by state chartered and other institutions. It also was to have a drastic impact on many other types of business arrangements and on the way business was conducted, who could insure deposits and changes in regulatory authority from states to the "feds."

744 F.2d 1402 at 1405, 1406.

Accordingly, Dimension and a number of other organizations and institutions that had relied on the prior "bank" definition filed timely petitions for review of the Board's amendment to Regulation Y pursuant to 12 U.S.C. § 1848. Dimension is a holding corporation that has received preliminary approval from the Comptroller of the Currency initially to establish and operate any four national banks of a proposed eventual network of thirty-one such banks. Dimension's banks will focus on the *consumer* financial services market and will not engage in the business of making "commercial loans" as that term is commonly used and was previously defined. *See* pages 40-42 and note 45 *infra*. Because the Board's new definition of commercial loans would severely restrict the kinds of investment activities in which Dimension can engage, Dimension's petition focused on the "commercial loan" aspect of the Board's redefinition.[5]

Dimension's petition and the petitions for review filed in other circuits were ordered consolidated before the

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[5] Dimension's brief here likewise primarily addresses the validity of the Board's redefinition of the "commercial loan" provision. Respondents American Financial Services Association, *et al.*, are filing a separate brief concerning the impropriety of the Board's redefinition of the "legal right to withdraw on demand" provision. Although these two issues are related, and together emphasize the extent of the Board's departure from Congress' intent in enacting and amending the BHCA, they are independent grounds for invalidating the Board's amended Regulation Y.

Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 2112(a). On September 24, 1984, that court invalidated the Board's redefinition of both the "commercial loan" component and the "legal right to withdraw on demand" component challenged by other parties. 744 F.2d at 1402.

The Solicitor General, after obtaining two extensions to consider the issue, authorized the Board to file a petition for writ of certiorari on its own behalf, which subsequently was filed on February 6, 1985. The petition was granted on April 29, 1985.

SUMMARY OF THE ARGUMENT

Congress has allocated jurisdiction to regulate financial institutions among a number of administrative agencies. In exercising this legislative responsibility, Congress has enacted and amended the statutes prescribing jurisdiction as it finds appropriate to accommodate beneficial changes, meet newly perceived needs, and transfer regulatory authority. Contrary to the suggestion of the Board's brief here, the authority and jurisdiction of the Federal Reserve Board within this framework are not plenary. Rather, the Board shares its regulatory role with other coordinate federal agencies, including the Comptroller and the FDIC, and with the states, and only Congress can expand or contract the Board's jurisdiction.

Congress granted the Board jurisdiction under the Bank Holding Company Act, in particular, to regulate institutions that manage or control "banks," as that term is specifically defined in the BHCA. Congress did *not* confer upon the Board the power to redefine its own jurisdiction. Nevertheless, the Board's amendment to Regulation Y fundamentally redefines a "bank" under the BHCA and would unilaterally expand the Board's jurisdiction at the expense of other regulators. The rationale for this redefinition, moreover, is not that the meaning of the statutory language Congress chose has

changed. Instead, the Board's acknowledged justification is its belief that certain developments in the financial market should be deterred and that the Board should be allowed now to reach institutions that otherwise would be regulated under statutes other than the BHCA. *See* Pet. Br. at 4-6.

1. The Board's action is impermissible because it violates the clear language, purpose, and history of the BHCA by sweeping into the Act a large number of institutions that Congress never considered "banks." Congress enacted the BHCA in 1956 to prevent excessive concentration of credit and to separate commercial banking and commerce. To those ends, Congress initially granted the Board jurisdiction over institutions that owned or controlled national or state banks, savings banks or trust companies. From the outset, however, Congress intended to limit the BHCA's scope to only those institutions needed to accomplish the Act's purposes.

In succeeding years, Congress twice narrowed the definition of "bank" to include only those institutions that both "accep[t] deposits that the depositor has a legal right to withdraw on demand" and that "engag[e] in the business of making commercial loans." 12 U.S.C. § 1841 (c). In adopting the "commercial loan" component of this definition in 1970, Congress purposefully excluded institutions that transacted in other, more passive investments that did not involve the potential for abuse in commercial credit to which the BHCA was directed. *See* pages 11-22 *infra*.

The clearest example of the impropriety of the Board's redefinition of the "commercial loan" limitation is that it sweeps back into the statute Boston Safe Deposit and Trust Company, an institution that Congress specifically intended to exclude in 1970 because it made no commercial loans. At that time, Boston Safe engaged in the very money market and interbank transactions that the Board's new regulation now labels "commercial lending."

Contrary to the Board's arguments, moreover, the 1970 amendments were not a private bill meant to exclude Boston Safe alone; the legislative history demonstrates that Congress intended to exclude *any* institution that did not engage in commercial lending. The Board's proposal now to "grandfather" some institutions like Boston Safe merely underscores the fact that the new Regulation Y would cover institutions Congress meant to exclude. *See* pages 19-21, 32-33 *infra.*

Beginning shortly after Congress enacted the "commercial loan" limitation in 1970, the Board consistently interpreted that term as excluding the same passive investment activities the Board would now include. In this series of decisions and opinion letters issued over twelve years, the Board specifically concluded that purchases of commercial paper, certificates of deposit and bankers' acceptances, the extension of broker call loans, the sale of federal funds to other banks, and comparable money market and interbank transactions do *not* constitute "commercial loans." This contemporaneous and longstanding interpretation demonstrates persuasively that the Board's new redefinition is inconsistent with the statutory language and Congress' intent, and that the redefinition is not entitled to the special deference the Board claims. *See* pages 22-27 *infra.*

When the Board abruptly changed its position in late 1982, in comments on the acquisition of a state bank by the Dreyfus Corporation, and subsequently adopted the amended Regulation Y, other federal financial regulators confirmed that the Board's new definition of "commercial loans" does not accord with Congress' understanding of the term or with the purposes of the BHCA. The Comptroller, the FDIC, three Federal Reserve Banks, and several members of Congress all commented that the Board's definition represented an impermissible attempt to expand its own jurisdiction. *See* pages 27-31 *infra.*

2. The Board is not entitled now to override Congress' "commercial loan" limitation simply because it believes

that market developments since 1970 would support enlarging the Board's jurisdiction. The Board's reversal of position has not been premised on any change in the nature or use of money market and interbank transactions that suddenly rendered them "commercial loans." The Board therefore cannot justify its reversal in terms of the characteristics of such instruments. These instruments are typically traded in a manner (*e.g.*, on a secondary market) which does not involve the type of lender-borrower relationship that can create a potential for abuses in the control and allocation of commercial credit, such as credit tying and discriminatory favoritism. Indeed, there is nothing even "commercial" about interbank transactions, and redefining "commercial loans" to include transactions between banks would be inconsistent with Congress' intent to distinguish in the BHCA between commercial banking and commerce.

More fundamentally, the Board's *post hoc* assertions that Congress' original objectives would be better served now by enlarging the Board's jurisdiction cannot justify this agency's effort to overrule Congress' intent as actually expressed in the Act. The Board's so-called "evasion" power also does not permit the Board unilaterally to expand its own jurisdiction. That evasion power necessarily corresponds to the scope of the Board's jurisdiction under the Act, and gives no authority to enlarge the Board's jurisdiction. Where Congress has determined that certain institutions' activities place them outside the Act's jurisdiction—and decided not to regulate those activities under the BHCA—the conduct of those lawful activities is no "evasion" of the Act or its purposes. *See* pages 31-45 *infra.*

3. The Board's new definition represents an effort to impose *its* policy view of what jurisdiction it should have without Congressional authorization and at the expense of coordinate federal agencies with different policy views. This arrogation of legislative power exceeds the constitutional role of an administrative agency and is particu-

larly inappropriate where, as here, Congress has declined to enact temporary legislation sought by the Board to accomplish these same changes and where Congress is continuing to weigh the appropriate scope of BHCA jurisdiction in proposals for permanent legislation. *See* pages 45-50 *infra.*

ARGUMENT

I. THE BOARD'S NEW DEFINITION OF "COMMERCIAL LOANS" IS IMPROPER, BECAUSE IT IS INCONSISTENT WITH THE LANGUAGE, PURPOSE, AND HISTORY OF THE BHCA.

Congress, and only that legislative body, bears the responsibility for assigning regulatory jurisdiction to administrative agencies and allocating jurisdiction among agencies. The principle has long been established that an agency cannot exceed the scope of the authority delegated by Congress, whether by regulation or administrative interpretation.[6] Just as an agency cannot exceed its granted jurisdiction, an agency also cannot use the "power to issue regulations" to "extend a statute or modify its provisions." *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). Even where an agency has consistently held that it possesses jurisdiction denied by Congress—which is not the case here, as shown *infra*—"an agency may not bootstrap itself into an area in which it has no jurisdiction." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

The definition of the term "commercial loans" in the BHCA determines the Board's jurisdiction under that Act. The validity of the Board's new definition of "commercial loans" in amended Regulation Y is therefore an

[6] *See, e.g., Peters* v. *Hobby*, 349 U.S. 331, 345 (1955); *Stark* v. *Wickard*, 321 U.S. 288, 309-10 (1944); *International Railway Co.* v. *Davidson*, 257 U.S. 506, 514-15 (1922); *United States* v. *Wickersham*, 201 U.S. 390, 398 (1906); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

issue of law, which governs the proper extent of the Board's jurisdiction. Such an issue is, of course, a matter for resolution by the courts on the basis of Congress' chosen statutory language and legislative intent. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981); *SEC* v. *Sloan*, 436 U.S. 103, 116-19 (1978); *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. at 745-46; *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *see* 5 U.S.C. § 706 (1982). As this Court emphasized in *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979), the interpretation of an agency's authority is "constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Id.* at 566 n.20. *Accord Securities Industry Association* v. *Board of Governors*, 104 S. Ct. 2979, 2983 (1984) (court must reject Board construction of statute that is inconsistent with the statutory mandate).

In this case, the Board's attempt unilaterally to expand its jurisdiction by promulgating an amended regulation that redefines the statutory term "commercial loans" is improper, because the Board's new definition conflicts with the clear language, purpose, and legislative history of the Bank Holding Company Act.

A. The Board's New Definition Contradicts the Language, Purpose, and Legislative History of the BHCA by Including Institutions that Congress Purposefully Excluded.

Congress has progressively narrowed the definition of a "bank" for purposes of the Bank Holding Company Act since the statute was originally enacted in 1956. As one step in this pattern of narrowing the reach of the Act, Congress added the "commercial loan" limitation to the "bank" definition in 1970. Like earlier legislative determinations, the purpose of this amendment was to exclude a category of institutions from the Act's jurisdic-

tion because Congress determined that the purposes of the Act did not require reaching those institutions. The Board's new definition of "commercial loans," which serves virtually to eliminate this limitation, is inconsistent both with Congress' intent for the limitation and with the overall direction of Congress' decisions to confine the definition of a covered "bank."

The original 1956 Act incorporated a charter-based test for the definition of a "bank." Institutions that were chartered as national or state banks, savings banks, or trust companies were considered "banks" subject to the BHCA. BHCA § 2(a) & (c) (1956). In choosing this broad definition, however, Congress made clear that it did not intend the BHCA to cover all financial institutions, but rather only those institutions believed necessary at that time to fulfill the Act's objectives. *See* S. Rep. No. 1095, 84th Cong., 1st Sess. 7-8, *reprinted in* 1956 U.S. Code Cong. & Ad. News 2482, 2489.

Congress thus tailored the original definition of a "bank" to enable the Act to achieve two main goals. First, Congress believed that "adequate safeguards should be provided against undue concentration of control of banking activities." *See* S. Rep. No. 1095 at 1. Second, and stemming from this first goal, Congress sought to keep certain types of banking activities separate from commercial activities, and therefore intended for bank holding companies to "confine their activities to the management and control of banks" and to avoid those activities "having no close relationship to banking." *Id.* Nevertheless, Congress determined from the outset that the scope of the Act—and the definition of a covered "bank" —should be as narrow as possible to accomplish the Act's goals:

> [T]he definitions in this bill will adequately cover the organizations which should be included in the scope of [the BHCA] without unnecessarily encompassing organizations that need not be included in order to accomplish the purposes of [the BHCA].

S. Rep. No. 1095 at 8.[7]

Congress determined in 1966 after reviewing the scope and operation of the BHCA that the charter-based definition of a covered "bank" was overly broad. Accordingly, Congress eliminated this original definition and substituted a narrower, more specific test. In particular, the 1966 amendments redefined "bank" as an institution that "accepts deposits that the depositor has a legal right to withdraw on demand."[8] The express purpose of this new definition, as the Board has recognized, was to exclude a number of financial institutions from the Act's coverage, based on Congress' determination that the statutory goals could be achieved without applying the Act to savings banks, trust companies, and industrial banks.[9] Indeed, the Board itself approved this narrowing

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[7] The Board's brief here virtually ignores Congress' first goal, and seeks to uphold the Regulation Y redefinitions largely on the basis of the Board's view of Congress' second purpose. This omission is not coincidental, since it is widely acknowledged that the development of non-BHCA banks actually increases competition in the banking and financial services industry (*see* pages 47-48 *infra*), and Congress' desire to promote competition and prevent undue concentration therefore conflicts with the Board's current effort to hinder the formation of non-BHCA banks. *See* Rspt. Doc. Supp., Add. I & J. Ironically, the legislative history demonstrates that Congress became concerned with the separation of certain banking activities from commercial activities only in connection with threats of undue concentration and insufficient competition. *See generally* Brief of Sears, Roebuck & Co., *et al.* as *Amici Curiae* in support of respondents.

[8] Pub. L. No. 89-485, § 3, 80 Stat. 236 (1966). The legislative history of these 1966 amendments is discussed in greater detail in the separate brief of respondents American Financial Services Association, *et al.*

[9] S. Rep. No. 1179, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385, 2391. *See* Pet. App. at 24a; S. Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5541.

of jurisdiction at the time, stating that "we see no reason in policy to cover such institutions under this act. . . ." [10]

The "commercial loan" limitation was added in 1970, when Congress determined that even the "legal right to withdraw" definition was too inclusive. In Congress' view, institutions that were not engaged in the business of making commercial loans also could safely be excluded from the "bank" definition without undermining the statutory goals. A commercial loan traditionally consists of a direct loan from a bank to a business customer, upon terms negotiated between the bank and that customer, for the purpose of providing funds needed by the customer in its business to meet working capital needs and finance inventory. *See* Pet. Br. at 39 (citing *United States* v. *Connecticut National Bank*, 418 U.S. 656, 665 (1974)). Such a loan, and the negotiation of its terms, necessarily involves a close lender-borrower relationship which can blur the separation of a commercial lender's activities from those of the business to which it lends, and creates the opportunity and potential for the lending bank to influence the borrower's financial operations or engage in improper credit tying or discriminatory conduct in the extension of credit.[11]

[10] Letter to the Hon. A. Willis Robertson, Chairman, Senate Committee on Banking and Currency, from J.L. Robertson, Vice Chairman, Board of Governors (April 20, 1966), *reprinted in Amend the Bank Holding Company Act of 1956: Hearings on S.2353, S.2418, and H.R. 7371 Before Subcomm. of the Senate Comm. on Banking & Currency*, 89th Cong., 2d Sess. 447 (1966).

[11] In a letter submitted to the Senate Committee, the Board itself expressed this very rationale for distinguishing between "commercial loans" and other kinds of transactions engaged in by institutions exempted by the 1970 amendments. Letter from Federal Reserve Board Vice Chairman J. L. Robertson to the Hon. John Sparkman, Chairman, Senate Committee on Banking and Currency (June 1, 1970), *reprinted in One-Bank Holding Company Legislation of 1970: Hearings Before the Senate Comm. on Banking and Cur-*

[Footnote continued]

Congress recognized that the purposes of the Act—"to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit"—required coverage only of banks that made commercial loans and presented a potential for these abuses, yet permitted the exclusion of banks that did not make such loans. S. Rep. No. 1084 at 24. According to the Committee Report accompanying the Senate bill, Congress previously had thought that the 1966 amendment would "exclude those institutions not engaged in commercial banking." *Id.* Upon learning otherwise in 1970, Congress considered the 1966 definition to be "too broad" and sought again to avoid subjecting to the BHCA "institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans." *Id.*

To accomplish this narrowing of jurisdiction, Congress amended the definition of "bank" to exclude specifically those institutions that do not "engage in the business of making commercial loans." [12] Although not the proponent of this amendment, the Board did concur at the time, noting that "there is less need for concern about preferential treatment in extending credit where no commercial loans are involved." [13]

rency, 91st Cong., 2d Sess. 136-37 (1970). The Board also continued to rely on this rationale in decisions and interpretations for twelve years after enactment of the 1970 amendments. *See* pages 22-27 *infra*.

[12] Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1762 (1970). Contrary to the Board's argument here, Congress' decision to narrow the definition of a "bank" was entirely consistent with its simultaneous decision to extend the Act to companies that controlled only one such bank. Pet. Br. at 42. While Congress subjected institutions properly considered "banks" to strengthened regulation, it also found that other institutions should not be considered BHCA "banks" in the first instance and, therefore, should not be regulated at all under the BHCA.

[13] Letter from Federal Reserve Board Vice Chairman J. L. Robertson to the Hon. John Sparkman, Chairman, Senate Committee on Banking and Currency (June 1, 1970), *supra* note 11, at 136-37.

The Board's attempt now to redefine these BHCA terms in Regulation Y to acquire jurisdiction over so-called "nonbank banks" is fundamentally inconsistent with Congress' decisions to narrow those same terms. Thus, rather than deal with the historical pattern of Congressional intent, the Board's brief seizes upon the fact that when Congress defined a BHCA "bank" as an entity that engages in the business of making commercial loans, Congress did not take the further step of enacting a specific definition of a "commercial loan." The Board suggests that this "failure" leaves it free to define that term. Pet. Br. at 39. If accepted, this argument's exclusive focus on the form of Congressional action, to the exclusion of recognizing Congress' substantive intent and purpose, would demand an unprecedented and unrealistic level of specificity by Congress. The rule cannot be that Congress cedes unlimited discretion to an agency to ignore legislative intent whenever Congress elects not to define all the subsidiary terms in a statutory definition.

Even in the absence of a specific statutory definition, the Board's redefinition of the "commercial loan" limitation cannot be reconciled with the language Congress did use and the intent it otherwise expressed. According to the Board, the commercial loan requirement is satisfied by any "direct or indirect extension of credit to a business organization" and the establishment of some "debtor-creditor relationship." Pet. Br. at 38-39. The statute, however, explicitly refers to "*making* commercial loans," and by these terms an institution that does not *make* the loan to the borrower cannot be a "bank." 12 U.S.C. § 1841(c) (to be a "bank," an institution must "engag[e] in the business of making commercial loans"). The "making" term thus limits the definition to institutions having some direct relationship with the borrower in extending the commercial loan. The term logically and necessarily excludes the purchase of commercial paper and other money market instruments in the secondary market that the Board now seeks to reach as "indirect" extensions of credit.

Congress' selection of the words "commercial loans" likewise precludes the Board's redefinition. This wording, on its face, should limit the definition to transactions ordinarily considered as "loans." Transactions described as "purchases of commercial paper" and "purchases of certificates of deposit" literally are purchases, like the purchase of a municipal bond or a security, and not "loans." Similarly, Congress' wording should also limit the definition to loans to "commercial" entities, not banks or consumers. In fact, given the Board's assertion that Congress intended for the BHCA to "separate banking from commerce," Congress could not simultaneously have intended to equate banks with commercial enterprises and thereby separate "banking from banking." Yet this is precisely what the Board's redefinition requires, by including in "commercial loans" such *interbank* transactions as the sale of federal funds, the purchase of certificates of deposit, and the deposit of interest-bearing funds.[14] These inconsistencies between the Board's redefinition and the actual words of the BHCA demonstrate an irreconcilable conflict between the Board's action and Congress' intent. For " 'no more persuasive evidence' " of Congress' intent can exist than the very " 'words by which the legislature undertook to give expression to its wishes.' " *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Congress enacted the "commercial loan" limitation based on the common banking usage of those words at the time, which was considerably narrower than what the Board has now proposed in order to expand its jurisdiction. As this Court recognized in a nearly contempo-

[14] The inclusion of interest-bearing deposits in the new commercial loan definition further highlights the difficulty of squaring that definition with the actual language of the statute. Coupled with the Board's new view of the "demand deposit" component of the Act's definition of "bank," this inclusion would mean that a BHCA bank would now be, in essence, any institution that "accepts and makes deposits." If this result had really been intended, Congress could have reached it by a much more direct route.

raneous decision, *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974), now curiously cited by the Board (Pet. Br. 39), "commercial loans" were considered different from "loans for securities purchases, trust services, investment services, computer and account services, and letters of credit." *Id.* at 665. Furthermore, a Board publication in the record of that case, which the Court relied upon, listed "commercial and industrial loans" as a category of bank assets separate and apart from "Federal funds sold," "customers' liabilities on acceptances outstanding," "loans to brokers and dealers in securities" and "other securities." [15]

The Board's redefinition simply ignores these traditional distinctions.[16] Had Congress meant for the BHCA to include institutions generally involved in supplying any form of "direct or indirect credit" to any type of "business entity," it would not have enacted the con-

[15] *See* 418 U.S. at 665 (citing App. 1793, which was Exhibit GX 118, a joint publication of the FDIC, the Board, and the Comptroller entitled "Assets and Liabilities—Commercial and Mutual Savings Banks—December 31, 1971).

[16] The only transaction the Board attempts to justify as a commercial loan based on any sort of traditional analysis or understanding is the purchase of commercial paper. Pet. Br. at 39-40. However, the materials the Board cites fall far short of equating these terms. Moreover, contrary to the Board's reliance on *Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979 (1984), that decision actually *rejected* the Board's argument that "commercial paper more closely resembles a commercial loan." *Id.* at 2987. Rather, the Court held that commercial paper constituted a "security" for purposes of the Glass-Steagall Act. In addition, the Court's statement that "the authority to discount commercial paper . . . places banks in their traditional role," *id.* at 2991, does not support the Board's position in the present BHCA context. Banks engage in many "traditional" investment activities, such as trading in government securities, which even the Board concedes are not "commercial loans" under the BHCA. *See* note 35 *infra*. Congress limited the BHCA to "commercial loans," and in particular, only those banks that actually engage in "making" the commercial loans. *See* page 16 *supra*.

siderably narrower "commercial loan" language. That language, when coupled with the "demand deposit" component of the BHCA "bank" definition, necessarily serves to distinguish "commercial banking" from *other categories* of banking and financial services. Indeed, this Court based its decision in *Connecticut National Bank* on the separate attributes and status of "commercial banks," notwithstanding the fact that other types of banks do compete directly with "commercial banks" in many respects. 418 U.S. at 660-66.

The Board suggests alternatively, and inconsistently, that no matter what Congress actually legislated, it really only meant to enact a private bill to exempt from the BHCA one institution, the Boston Safe Deposit & Trust Company. Pet. Br. at 13, 41. Yet the 1970 amendments were enacted as a public law and codified as such, not as a private bill.[17] Moreover, although the Boston Safe situation may have prompted the enactment of the "commercial loan" limitation, the Senate Committee Report is unequivocal in explaining that the amendment was

[17] The Board bases its suggestion on the fact that Senator Brooke of Massachusetts introduced the commercial lending provision. In fact, however, Senator Brooke had introduced a comprehensive bill to amend the BHCA, and this provision was originally a part of that bill. *See* S. 3823, 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 14818-22 (1970). *See generally* Brief of Sears, Roebuck & Co., *et al.* as *Amici Curiae*.

The Board also takes out of context a quote from the House conferees to make it appear as though they had a specific intent that the commercial loan provision be interpreted narrowly. *See* Pet. Br. at 41-42. In fact, the conferees were referring in general terms to all nine of the 1970 amendments' exemptions. More importantly, interpreting an exemption "narrowly" still requires giving the exemption the full construction and effect Congress intended. In any event, the passage the Board quotes is of doubtful value, since the commercial loan provision was added by the Senate, and Senator Sparkman specifically cautioned at the time that "language in a statement of [House] managers cannot be authoritative on the question of a Senate amendment" to this legislation. 116 Cong. Rec. 42422 (1970).

intended to exclude *any* "institutions that are not engaged in the business of making commercial loans." S. Rep. No. 1084 at 24.[18]

The circumstances concerning Boston Safe nevertheless are illustrative of the inconsistency between the Board's redefinition and the legislative history. Boston Safe at the time received demand deposits but did "no commercial lending." 116 Cong. Rec. 25848 (1970). It did, however, engage in precisely the kind of money market and interbank transactions that the Board would now define as commercial loans.[19] Consequently, even if one assumed *arguendo* that Congress intended to exclude only Boston Safe and institutions engaged in identical activities, that intent would preclude sustaining the Board's new definition of commercial loans.

To avoid this inconsistency with the legislative history, at the same time the Board suggests that the 1970 amendments constituted a private bill for Boston Safe, the Board also contends that Congress enacted the private

[18] The Senate Committee Report's description of this exemption in broad and generic terms, using the plural "institutions," can be contrasted with the Report's reference to another provision as being prompted by a "unique situation existing in the State of Missouri" involving only a "limited number of trust companies." *Compare* S. Rep. No. 1084 at 24 *with id.* at 12. Congress knew very well how to describe a unique or limited exemption, and it chose not to use such a description for the "commercial loan" exemption.

The Comptroller's Office has similarly concluded, based on its expertise and understanding of the legislative history, that "it is clear that the narrowing of the definition of 'bank' was not intended to be applicable only to Boston Safe." J.A. at 77A.

[19] The Regulation Y comment letter of Boston Safe's parent company confirmed that "[i]n 1970, Boston Safe purchased money market instruments (e.g., certificates of deposit, commercial paper and bankers' acceptances) and sold Federal funds—activities included in the proposed [Board] definition." Rspt. Doc. Supp., Add. T at 2. The letter pointed out that the Board's new commercial loan definition would now "render Boston Safe a 'bank' for purposes of the BHC Act and Regulation Y." *Id.*, Add. T at 1.

bill without knowing that Boston Safe engaged in these money market and interbank activities. Pet. Br. at 43. In effect, the Board argues that Congress' action in 1970 should be nullified because Congress did not know what it was doing. Such an assumption of Congressional ignorance cannot be supported as a matter of fact or law, nor can the Board's startling approach to statutory analysis based on that assumption be reconciled with the judiciary's appropriate role in interpreting federal legislation.[20] Simply put, the Boston Safe situation clearly demonstrates the inconsistency between the Board's new definition of "commercial loans" and Congress' intent, by sweeping back into the Act institutions Congress purposefully excluded.

In summary, the Board's new regulation, which in effect renders Congress' 1970 commercial loan limitation a nullity, is inconsistent with both the statutory language and the legislative history. The principle is well settled that Congress will not be presumed to enact a provision that is without meaning or is unnecessary,

[20] C. Sands, *Sutherland Statutory Construction* § 45.12 (4th rev. ed. 1984) (legislative language must be interpreted by courts on the assumption that the legislature was aware of relevant statutes and facts). The Board's argument is based on the fact that the legislative history does not expressly note Boston Safe's money market and interbank activities. Pet. Br. 43. Yet the Board points out that Congress had become familiar with Boston Safe's situation during the 1966 amendments, Pet. Br. at 43 n.53, and it strains credulity to suggest that Congress legislated twice in the dark. A far more plausible explanation is that there simply was no need or occasion to refer to Boston Safe's specific activities. Congress was concerned with "commercial loans," and no one had ever considered this term to include money market and interbank transactions. Congress had no reason to reiterate an obvious proposition, which was confirmed shortly thereafter by the Board's *express* determination that Boston Safe's money market and interbank transactions did not constitute "commercial loans" as that term had been used by Congress. *See* pages 22-23 *infra*. Significantly, the Board's brief carefully stops short of affirmatively claiming that *it* was unaware of Boston Safe's specific activities in 1970.

and an interpretation such as the Board's that emasculates the words Congress chose must be rejected. *See United States* v. *Menasche*, 348 U.S. 528, 539 (1955); C. Sands, *Sutherland Statutory Construction* §§ 45.12, 46.06 (4th rev. ed. 1984) (it cannot be presumed that Congress would do a futile thing).

B. The Board's Own Contemporaneous and Longstanding Definition of "Commercial Loans" from 1970-1982 Excluded the Very Instruments the Board Now Attempts to Include.

From 1970 to late 1982, when the Board perceived a need to expand its jurisdiction, the Board consistently held that the term "commercial loans" does not include passive investment activities such as money market and interbank transactions. According to the Board's decisions, companies that engage in such activities are not subject thereby to the BHCA. This "contemporaneous interpretation of a . . . statute by an agency charged with its enforcement" is entitled to far greater weight in ascertaining Congress' original intent than the Board's new redefinition, which largely ignores that intent. *See BankAmerica Corp.* v. *United States*, 462 U.S. 122, 130-32 (1983); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Moreover, the longstanding "want of assertion of power" over institutions which engage in money market and interbank transactions by those charged with the enforcement of the BHCA demonstrates that the Board itself did not believe the "power was actually conferred." *BankAmerica Corp.* v. *United States*, 462 U.S. at 131 (quoting *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)). *Accord FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949).

The Board first announced its contemporaneous construction in 1972 when Boston Safe sought an official confirmation that its investment activities did not constitute "commercial loans." The Board concluded that Boston Safe's purchases of certificates of deposit, commercial paper, and bankers' acceptances were "not regarded as commercial loans for purposes of the Act," and that the sale of federal funds was not "tantamount to the making of a commercial loan" for purposes of the BHCA.[21] Thus, the Board's initial regulatory expression on the definition of "commercial loan" coincided with the limitations intended by Congress' 1970 amendments.

The Board's understanding of Congress' intent was repeated and explained more fully in a 1976 opinion from its Legal Division concerning broker call loans. In this opinion, the legal staff explained the characteristics of money market instruments that distinguish them from commercial loans. Investment vehicles like call loans, the Board's staff emphasized, are entered on a daily basis with a mutual option not to renew, are a temporary means of investing idle funds and are viewed by the investing institution as an alternative to other money market instruments, such as commercial paper or certificates of deposit.[22] Significantly, the opinion letter recognized that call loans are a "passive medium of investment," in which the lender bases his investment decision on its analysis of money market rates (*id.*)—not the attractiveness of the borrower, as is the case with commercial lending. As a result, call loans lack the close lender-borrower relationship that poses the potential for credit abuses at which the BHCA was principally directed:

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[21] Letter to Lee J. Aubrey, Vice President, Federal Reserve Bank of Boston, from Michael A. Greenspan, Assistant Secretary, Board of Governors, at 2 (May 18, 1972) (J.A. 94A). Although the Board added the qualifier "in the circumstances of this case," neither in this letter itself nor in any subsequent statement has the Board identified the "circumstances" referred to, or how the meaning of the statutory term can vary in other circumstances.

[22] Letter to Michael A. Greenspan, Metzger, Noble, Schwartz & Kemplar, from Baldwin B. Tuttle, Deputy General Counsel, at 2-3 (January 26, 1976) (J.A. 100A-101A).

'Call loans' thus do not appear to have the close lender-borrower relationship that is one of the characteristics of commercial loans and which presents the possibility of abuses relating to the control of commercial credit that concerned the Congress in adopting the commercial lending test.

Id. Accordingly, the 1976 opinion concluded that broker call loans were not "commercial loans" within the meaning of the BHCA. *Id.*

In 1980, the Board's Legal Division again distinguished "commercial loans" from other "passive medi[a] of investment" when it held that the purchase of the guaranteed portions of SBA and FHA loans through nonbank dealers on the secondary market did not constitute commercial lending. Again, the opinion concluded that these instruments "do not appear to involve the particular type of lender-borrower relationship that is one of the characteristics of commercial loans, and which presents the possibility of abuses relating to the control of commercial credit that concerned Congress when it adopted the commercial lending test, found in the Act." [23]

An internal Board memorandum prepared in February 1981 summarized the Board's longstanding interpretation and concluded that money market instruments, such as certificates of deposit, commercial paper and bankers' acceptances, and the purchase of federal funds, did not constitute commercial loans, nor were broker call loans or securities transactions "commercial loans" for purposes of the BHCA. Federal Reserve System, Office Correspondence (February 10, 1981) (J.A. at 96A-98A). In summarizing the consistent understanding followed by the Board from the first decisions after Congress enacted the commercial loan limitation in 1970, the memorandum concluded:

[23] Letter to William McDonough, Assistant General Counsel, Federal Reserve Bank of Boston, from Robert E. Mannion, Deputy General Counsel, at 2 (November 13, 1980) (J.A. 104A-105A).

In each instance, the Board or its staff found that these transactions did not involve the particular type of lender-borrower relationship that is one of the characteristics of commercial loans, and which presents the possibility of abuses relating to control of commercial credit that concerned Congress when it adopted the commercial lending test.

Id. (J.A. at 97A-98A).

The Board reaffirmed this position later in 1981 when it approved the legal basis for the acquisition of Fidelity National Bank by Associates First Capital Corporation, a subsidiary of Gulf & Western, a non-banking corporation. The national bank had divested its entire commercial lending portfolio, but continued to engage in various money market and interbank transactions.[24] Despite this continuing money market activity, the Board concluded that Fidelity was not engaged in commercial lending and thus was not a "bank" as that term is used in the BHCA.[25]

Similarly, the Board in 1982 approved or took no action with regard to several acquisitions in which the acquired institution both offered NOW accounts and engaged in money market and interbank transactions.[26] In

[24] *See* Bank Admin. Instit., Innerline, Index of Bank Performance (1982) (Associates National Bank) (J.A. 108A). Fidelity was later renamed Associates National Bank.

[25] Letter to Robert C. Zimmer, Zimmer & Einhorn, from James McAfee, Assistant Secretary, Board of Governors (March 12, 1981) (J.A. 110A-112A).

[26] *See, e.g.*, Rubenstein, "Household Finance Parent to Enter Banking By Acquisition," *American Banker* at 1 (July 13, 1981) (J.A. 113A-115A); "Fed Allows Citicorp to Acquire Fidelity," *American Banker* (Sept. 30, 1982) (J.A. 116A-126A); [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 98,770 (May 28, 1981) (Chrysler Corp.). The Board required Chrysler to forego the use of commercial paper and bankers' acceptances, but did not indicate that other money market and interbank instruments were barred.

the case of Citibank, which was permitted to acquire a savings and loan, the Board determined that "a federally insured savings and loan association that offers NOW accounts and exercises no greater commercial lending powers than are now permitted to a federal savings and loan association . . . is not a 'bank' for purposes of the BHC Act." J.A. at 128A. Since a savings and loan's "lending powers" include the unlimited power to purchase several types of money market and interbank instruments, the Board necessarily determined that such activities did not entail "commercial lending." *See* 12 U.S.C. § 1464(c) (1976) (amended 1982).[27]

The Board's brief barely mentions the existence of these prior decisions and its contemporaneous construction of the commercial loan limitation. When it does, the Board only briefly suggests that these decisions were "isolated cases" or that they "were made in the context of institutions engaged in very limited functions." Pet. Br. at 4, 17, 47. To the contrary, the reasoning of these decisions confirms that they rested on a thorough inquiry into the nature of the transactions involved. The decisions were not based on the size of the institutions or the volume of their business, and the Board has not offered a principled explanation for expanding and contracting the statutory "commercial loan" term when applied to different financial institutions. In fact, these decisions reveal a clear, consistent pattern of contemporaneous construction, uncontradicted by any other decisions during these twelve years. The nature, source and reasoning of the decisions reveal that they are far from being "isolated cases."

[27] Indeed, even in the Board's *Beehive* decision in March 1981, when the Board first announced its new definition of the "demand deposit" requirement, the Board continued to recognize that such passive instruments as certificates of deposit, government securities, and interbank trading vehicles were not considered "commercial loans." 68(4) Fed. Res. Bull. 253, 254 n.5 (Apr. 1982).

The Board's brief thus appears to proceed primarily on the assumption that even if its new regulation does reflect a "complete change in position," the Board is free to do so. Pet. Br. at 46-47. However, the question here is one of ascertaining Congress' intent when it enacted the "commercial loan" limitation in 1970, and that Congressional intent controls the current meaning of the limitation and the resulting scope of BHCA jurisdiction. *See* pages 10-11 *supra*. While the Board may reverse its own views on some questions, the Board cannot reverse Congress' intent, particularly not Congressional intent regarding the Board's jurisdiction. *See* pages 32-38 *infra*. Thus, the real significance of the Board's history of contemporaneous statutory construction is not just that the Board has "changed its mind," but rather that its own long-held interpretations of the BHCA persuasively demonstrate a Congressional intent for the Act that precludes the new definition the Board now advances in order to expand its jurisdiction.

C. The Response of Other Federal Financial Regulators Confirms the Inconsistency of the Board's New Definition with Congress' Intent.

The response of other federal regulatory agencies further demonstrates how far the Board's new definition of commercial loans departs from common usage and the purposes of the BHCA. The Board first signalled its reversal of position on the "commercial loan" limitation in December 1982, in connection with a proposal by Dreyfus Corporation to acquire the Lincoln State Bank. Despite Dreyfus' plans to follow the same format approved in the Gulf & Western case (*see* page 25 *supra*), the Board asserted in a letter to the FDIC that this acquisition would be subject to the BHCA.[28] For the first

[28] Letter to William M. Isaac, Chairman, FDIC, from William W. Wiles, Secretary, Board of Governors (December 10, 1982) ("Dreyfus Letter") (J.A. 65A-70A). Lincoln, a state-chartered bank, was

[Footnote continued]

time, the Board announced that the previously limited "commercial loan" term now included the purchase of "commercial paper, bankers acceptances, and certificates of deposit, the extension of broker call loans, the sale of federal funds, the deposit of interest bearing funds and similar lending vehicles." *Id.* at 68A.

The FDIC, in response to the Board's Dreyfus letter, reminded the Board that "a number of clear precedents exist, dating back a number of years, for a bank to be held exempt from the definition of 'bank' in the Bank Holding Company Act based on the divestiture of its commercial loan portfolio prior to the acquisition and its agreement not to engage in the business of making commercial loans in the future."[29] "[C]onstrained to follow the clear legal precedents established over the years," the FDIC approved the Dreyfus acquisition, noting that the Board had "dramatically re-cast the definition of commercial loan by including within it certain activities that clearly had been excluded from the definition in the past." *Id.* at 91A-92A.

The Comptroller of the Currency also opposed the Board's sharp reversal. In approving Dreyfus' separate request for a national bank charter, the Comptroller's Office concluded "that the inclusion of money market transactions within the BHCA term 'commercial loans' is not supported by the purpose or the legislative history of the BHCA."[30] Following the same view the Board had previously adhered to, the Comptroller recognized

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insured by the Federal Deposit Insurance Corporation and FDIC permission for the acquisition was needed irrespective of the BHCA.

[29] Letter to William W. Wiles, Secretary, Board of Governors, from Margaret L. Egginton, Deputy to the Chairman, FDIC at 1 (December 29, 1982) (J.A. 90A).

[30] Comptroller Decision To Charter Dreyfus National Bank & Trust Company (February 4, 1983) (J.A. 71A, 76A).

that Congress in 1970 had exempted institutions not engaged in commercial lending like Boston Safe, which was then dealing in the very instruments that the Board now labelled "commercial loans."[31]

When the Board nevertheless subsequently proposed to amend Regulation Y, to force the expansion of its jurisdiction, the FDIC and the Comptroller's Office again submitted opposing comments, repeating the criticisms raised in their Dreyfus Letters. Rspt. Doc. Supp., Add. D & Add. C. Both the FDIC and the Comptroller's Office emphasized that the jurisdictional definition of "bank" was a matter properly determined only by Congress. *Id.*, Add. C at 5. As the FDIC recognized, "[t]he Board is attempting to resolve by regulation serious issues that will affect the entire financial industry" and "a wiser alternative is to encourage Congress" to analyze what, if any, legislative response was necessary. J.A. at 33A.

In addition to the expert views of these two coordinate agencies, three Federal Reserve Banks submitted comments emphasizing that the new Regulation Y pushed the Board's jurisdiction under the BHCA beyond the bounds set by Congress. The Atlanta Federal Reserve Bank warned that the Board's reinterpretation improperly expanded the scope of the BHCA's jurisdiction, noting that "[s]ince the new definition of commercial loans has no basis in tradition or in the BHC Act it appears to pro-

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[31] *Id.* at 77A-78A. The Comptroller's statement reaffirmed, as the Board had previously concluded, that money market and interbank instruments were "essentially passive medi[a] of investment, are reviewed on a very frequent basis, and do not involve a close lender-borrower relationship." *Id.* at 79A. Accordingly, they posed "little potential of involving the types of commercial lending abuses" to which the BHCA was directed. *Id.* The Comptroller also recognized that the Board's new position violated the limited scope of the BHCA, noting that "Congress did not intend" the limiting 1970 amendments to be so interpreted "as to subject to the BHCA those financial institutions which need not be subject" to the Act to accomplish its purposes. *Id.* at 77A.

vide an overly broad extension of the regulation." Rspt. Doc. Supp., Add. E. at 3. The Federal Reserve Bank of San Francisco recognized the same overextension, noting that "we are not convinced that the Board's expansive reading of 'bank' is justified, or [that] Congress intended that so-called 'nonbank banks' be subject to Board authority under the Bank Holding Company Act." J.A. at 30A. The Federal Reserve Bank of Chicago similarly labelled the commercial loan redefinition "unduly restrictive." Rspt. Doc. Supp., Add. G at 1.[32]

Even members of Congress submitted comments that the Board's proposal far exceeded the reach intended by the 1970 amendments. Recognizing that "Congress has been wrestling with the problems of banking deregulation and the expansion of financial services for some time," Senator Abdnor questioned the propriety of the Board's action. Rspt. Doc. Supp., Add. L at 1. Similar concerns were voiced by legislators on both sides of the Capitol. *See id.*, Add. M (Representative Parris), Add. N (Representative Shumway), Add. O (Senator Simpson), Add. P (Senator Trible), Add. Q (Representative Vento), and Add. R (Representative Dreier).

In light of these comments by coordinate expert agencies and legislators, and the Board's own contrary con-

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[32] In a classic rendition of "pay no attention to that man behind the curtain," the Board fleetingly observes at the end of its last footnote that "the opinions of Federal Reserve Banks . . . are not binding on the Board." Pet. Br. at 50 n.61. But what is technically "binding" is, of course, beside the point. The Federal Reserve Banks are at least as well versed in the common usage of the term "commercial loan," and in the nature and uses of various financial instruments, as the Board. Indeed, they have even more "hands-on" experience in dealing with these instruments and in the day-to-day regulation of bank holding companies. Accordingly, the Board's plea for deference in this case is seriously undermined when its constituent banks—the major source of the particular "expertise" the Board now invokes—disagree with the Board's interpretation and state that it is exceeding the jurisdictional limits of the BHCA.

temporaneous construction, the Board's claim here of entitlement to "greatest deference" for its "expertise" is difficult to credit. Pet. Br. at 49-50. *See, e.g., FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 294-98 (1954) (in areas of shared expertise and responsibility, courts must consider the expert views of coordinate agencies). No provision in the BHCA authorizes the Board to adjust the "commercial loan" limitation to expand the Board's jurisdiction by administrative fiat, and this case does not involve a review of Board discretion in acting pursuant to such a non-existent statutory delegation.

Rather, the issue here is what Congress intended the "commercial loan" limitation to exclude when Congress redefined the jurisdictional limits of the Act in 1970. The expert views of the FDIC, the Comptroller's Office, and the Federal Reserve Banks are consistent with the Board's own contemporaneous construction, and persuasively confirm that the Board's original interpretation accurately reflected Congress' intent. *See BankAmerica Corp.* v. *United States*, 462 U.S. 122, 132 (1983). The Board's new view on this issue of legal interpretation, based on the Board's unilateral determination to expand its jurisdiction rather than a reassessment of Congress' original intent—and given its inconsistency with the contemporaneous construction—is entitled to little or no deference at all. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-43 (1976); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

II. CONGRESS DID NOT GIVE THE BOARD AUTHORITY TO OVERRIDE THE "COMMERCIAL LOAN" LIMITATION AND EXPAND THE SCOPE OF THE BOARD'S JURISDICTION.

The Board advances essentially two rationales for sustaining its redefinition of the "commercial loan" limitation and enlarging the Board's jurisdiction. First, the Board contends that due to developments since 1970, Congress' original purposes would support expanding the Board's jurisdiction to reach institutions previously ex-

empted from the Act. Second, the Board asserts that its authority to prevent "evasions" of the Act supports overriding the "commercial loan" limitation as originally conceived. Neither rationale can withstand analysis.

A. The Board's *Post Hoc* Arguments About the Nature of Money Market and Interbank Transactions in View of Marketplace Developments Can Not Justify the New "Commercial Loan" Definition.

The Board's brief seeks to sustain the Board's redefinition on the ground that Congress' objectives for the Act would now be better served by enlarging the Board's jurisdiction. This contention is misconceived even at its premise, since the Board's policy arguments cannot permit the *Board* to override administratively Congress' enactment of the "commercial loan" limitation in 1970. Moreover, the Board has advanced these arguments only as *post hoc* rationalizations for its action and has never been able to relate these arguments to Congress' actual purpose for enacting the BHCA.

The demarcation of jurisdiction under the BHCA is an issue of law to be resolved based on Congress' intent. *See* pages 10-11 *supra*. Contrary to the Board's suggestion in its claim to great deference, this is not an instance where Congress failed to express any intent. Pet. Br. at 50. As demonstrated above, Congress' intent in 1970 can be discerned, and the Board's redefinition is inconsistent with that intent. *See* pages 14-21 *supra*.

Indeed, the Board's record itself provides one of the clearest illustrations of that inconsistency and of the true nature of the Board's action. In recognition that sweeping Boston Safe back under the Act would openly violate Congress' intent, the Board has offered to "grandfather" Boston Safe.[33] However, this solution cannot excuse the

[33] *See* Board Legal Division Memorandum, Record at 1445-46. The Board did not even hazard an explanation of how it could override the terms of the BHCA by exempting institutions which it now claims are subject to the Act, and which, under the Board's new interpretation, have been operating illegally for over twelve years.

conflict with Congress' intent to exclude that institution based on the same money market and interbank transactions at issue now. "The law does not permit an agency to exercise powers expressly denied it by Congress if it includes a variance mechanism that perhaps will be used to bring the agency's regulations within the boundaries established by the statute." *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1358-59 (D.C. Cir. 1980). While the Board may offer a regulatory loophole of its own to permit institutions like Boston Safe to "petition the Board for relief on grounds of unfairness or hardship," this offer cannot obscure the invalidity of a definition that requires institutions like Boston Safe to "petition" the Board in the first place. The Board's quasi-legislative grandfathering thus actually emphasizes the fact that the Board's redefinition turns the legislative history on its head and would render Congress' specific intent to exclude such institutions a nullity.

The Board's current arguments about the purported "true" nature of money market and interbank transactions, in view of recent developments in the industry, therefore constitute nothing more than its assertion that Congress' 1970 action was or has become "deficient" in some manner. *See* Pet. Br. at 39-41, 47-48. But these assertions and new policy arguments cannot reverse Congress' intent. Rather, those assertions are for Congress to weigh against competing policies—as it is now doing—and not for the Board to implement unilaterally. *See* pages 45-50 *infra*.

Not only are the Board's policy justifications misdirected, but they also have all been offered as *post hoc* rationalizations, *see Securities Industry Association* v. *Board of Governors*, 104 S. Ct. at 2983-84, and are unrelated to Congress' actual purposes in enacting and amending the BHCA. In particular, when the Board first proposed its amendment of Regulation Y, the only rationale given was the desire to simplify the regulation and

revise filing and processing procedures for applications under the Act. Merely passing reference was made to its inclusion of the new "bank" definition (48 Fed. Reg. at 23521), and the Board tendered no elaboration or rationale for its revisions to that definition in either the Background and Summary section of the rulemaking notice or the accompanying Regulatory Analysis. Only subsequently, in an Appendix published at the time it finally adopted the revised Regulation Y, did the Board identify the "factual" and policy grounds it thought relevant and attempt to justify the redefinition.[34]

The grounds eventually invoked by the Board for its reformulation, moreover, ignore the fact that at the time of the 1970 commercial loan amendment, Congress was primarily concerned with preventing possible abuses related to the control and allocation of commercial credit, such as unfair tying and discriminatory treatment. *See* pages 14-15 *supra;* Pet. Br. 42. Congress believed that this policy goal of the BHCA was adequately served by limiting the Act's coverage to banks that engage in commercial lending. The straightforward principle applied by Congress was that an institution which does not make loans to commercial entities in the first place cannot abuse the allocation of such credit.

The money market and interbank transactions that the Board now labels "commercial loans" are not susceptible to the abuses Congress intended to prevent because they

[34] *See* 49 Fed. Reg. 794, at 833-42. As a result, the Board prevented Dimension and other parties from submitting factual evidence to challenge the "findings" recited in this Appendix and now reiterated in the Board's brief as justifications for the redefinition. Based on the Board's failure to provide adequate notice and allow comment on the purported justifications for the redefinition, Dimension argued in the court of appeals that the Board's amendment violated the notice-and-comment requirements of the Administrative Procedure Act. Ct. App. Jt. Br. at 38-42. The court below did not reach this procedural argument, due to its invalidation of the amendment on substantive grounds.

do not involve the close lender-borrower relationship which affords a realistic potential for tying and discrimination. The Board itself reached exactly this conclusion during the twelve years it consistently acknowledged that "commercial loans" did not include such transactions. *See* pages 22-27 *supra.* The Board has not advanced any plausible rationale now to explain its implicit new conclusion that these investment vehicles, which the Board in the past consistently termed passive investment media, suddenly possess the close lender-borrower relationship and resulting potential for abuse that implicate the BHCA's purposes.

In fact, money market instruments and interbank transactions are employed as short-term vehicles to place temporarily idle funds and are utilized by banks and other financial institutions for asset-liability management. Money market instruments are usually bought and sold through the active secondary market, and their rates are set by general market conditions. As a result, these types of financial instruments are basically fungible.[35] An institution's decision to buy or sell any particular instrument is necessarily made on the basis of typical *investment* considerations like market levels and trends, and prevailing interest rates, and any given transaction can have no appreciable impact upon the entire market or any specific "pair" of buyers and sellers who participate in it.

[35] *See, e.g.*, 63(6) Fed. Res. Bull. 525 (June 1977) (for investors, "commercial paper—because of its relatively low risk and short maturity—is a close substitute for money market instruments such as Treasury bills and large-denomination certificates of deposit (CD's). As a consequence, yields on commercial paper move in concert with yields on these other short-term market instruments.") In addition, the fact that these instruments are interchangeable with government money market instruments further belies any assertion that they are used for purposes other than short-term investment. Even the Board does not claim that government money market instruments are commercial loans. *See* Pet. App. at 46a & n.29.

For example, a purchase of one bank's certificate of deposit does not "favor" that bank since, in an open market of buyers and sellers with competitive rates, the rate at which the certificate of deposit sells is set by the sum total of all buying and selling decisions, not the action of any particular purchaser.[36] Any distortion in the marketplace caused by a large purchase of a particular instrument by a particular buyer would be quickly eliminated through arbitrage, making such an effort pointless. Thus, no single bank could materially affect the market rate at which any money market instruments trade. Moreover, because the rate is set by the market and the terms are usually standardized, the buyer can have no particular influence over the seller.[37]

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[36] Thus, the Board's statement that an institution "could refuse to purchase such instruments from competitors" is mistaken in its implication that such a refusal would have an effect on the seller's ability to sell in the open market. Pet. App. 56a.

[37] The Board claims that a substantial number of money market transactions are the result of direct "negotiations." Pet. Br. at 44. A more correct statement of the Board's support for its assertion is that money market instruments can be the result of direct "sales" (*see* Pet. Br. n.55), which is *not* the equivalent of the Board's suggestion that the instruments are the product of extensive back-and-forth negotiations. Because money market instruments are used as short-term investment vehicles to place temporarily idle funds, the instruments must be liquid. As a result, the instruments contain standardized terms, and even in a direct sale, they trade at rates which merely reflect the secondary market where the instruments must be resold. The nature of these instruments and the market therefore prevent abuses in direct sales.

Furthermore, the Board's commercial loan definition is not even limited to directly negotiated transactions, but also encompasses trading on the secondary market, where there cannot even be a pretense that a buyer can favor or influence a seller, let alone the original issuer of a money market instrument. The original issuer is not even a participant in the secondary market and, instead, has received the proceeds from the instrument's issuance before any trading in that market ever takes place.

For the foregoing reasons, the Board has been unable to point to any real abuses in the marketplace that might justify its new commercial loan definition. Instead, the Board's Appendix published with the redefinition sought to justify the amendment by asserting a "potential" for danger, and the Board's brief repeats this approach. Pet. Br. 44-45. However, these conclusory assertions lack any genuine support in the record. For example, with respect to money market instruments, the Board's Appendix claimed that "even when purchased through brokers, the lender knows the borrower's identity." Pet. App. at 55a. Yet nowhere does the Board explain what significance this fact has. The Board further commented that "[b]ased on its experience, the Board is aware that holders of large amounts of so-called money market instruments relative to the size of the borrower are in a position to influence the conduct of the borrower, and do at times exercise this influence." *Id.* This statement begs all the critical questions, such as who those holders are, how they go about exercising the alleged influence, how long the Board has been "aware" of such activities, and why the Board excluded money market instruments from its interpretation of "commercial loans" for twelve years if it really was aware of such activities. By failing to provide any concrete information to substantiate such assertions, the Board simply demonstrates the absence of any genuine factual support.

In sum, the Board cannot justify its new definition on the ground that, based on its "findings," the Board is entitled to "change its mind" about commercial loans under the standards set forth in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). Pet. Br. 46-47. Certainly the Board has not provided the type of "reasoned analysis," responsive to the basis for its contemporaneous interpretation and Congress' purposes, that this decision requires. But more fundamentally, the issue in this case is one of jurisdiction and statutory construction, not the

exercise of acknowledged regulatory power. In this context, even if the Board could provide a "reasoned analysis" for the change, it would not authorize the Board to expand its own jurisdiction in a manner that conflicted with Congress' intent, as evidenced by the language and legislative history of the statute.[38] *See* pages 10-11 *supra* and 49-50 *infra*.

No matter how strenuously the Board lays claim to special deference (Pet. Br. 48-50), the Board cannot redefine its own jurisdiction or rewrite Congress' purposes. Here, moreover, even simple deference is limited, since the Board is attempting to expand its jurisdiction by an abrupt change in policy that does

> not demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to vest the [agency] with the authority it is now seeking to assert.

Federal Maritime Commission v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

B. The Board's Claimed Power to Prevent Evasions Does Not Expand the Scope of Authority Conferred by Congress.

In apparent recognition that the "commercial loan" provision cannot be reinterpreted to include money market and interbank transactions instruments based on assertions of their use or abuse, the Board also seeks to justify its position by relying on its purported authority to prevent "evasion" of the BHCA where banks seek to offer "as wide a range of lending services as possible yet without becoming banks for purposes of the Act." Pet. Br. 47. This rationale is equally incapable of expanding the Board's jurisdiction. Where, as here, Congress has explicitly excluded certain activities from the scope of the Act, no evasion occurs when an institution engages in those activities but is not otherwise subject to the Act. The Board's "evasion" argument merely confirms the position of the other federal financial regulators—that the Board is attempting to expand the reach of the Act and its own jurisdiction through unilateral administrative action when the decision is one properly for Congress.

This Court has previously recognized in a number of cases involving the Securities and Exchange Commission's remedial powers under § 10(b) of the 1934 Securities Exchange Act, that an agency's "evasion" authority does not permit it to rewrite statutory limits. Thus, in *Chiarella* v. *United States*, 445 U.S. 222 (1980) (Powell, J.), the Court held that an employee of a financial printer did not violate the securities laws by using for personal gain information obtained in documents delivered to the printer prior to their public distribution. As the Court explained, that securities law attacks only "frauds" and where, as in that case, no fraud was shown, the agency could go no further. The Court reasoned that the 1934 Act "cannot be read more broadly than its language and the statutory scheme reasonably permit" and while "Section 10(b) is aptly described as a catchall provision, . . . what it catches must be fraud." *Id.* at 234-35 (quoting *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)).

Similarly, the Court in *SEC* v. *Sloan*, 436 U.S. 103, 116 (1978) (Rehnquist, J.), in ways precisely applicable to the Board's reliance on its evasion authority here, recognized the limits to the SEC's power under § 12(k)

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[38] The Board's reliance on other decisions for this argument is also misplaced. *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, 104 S. Ct. 2778 (1984), dealt with a situation where Congress had no intent on the question resolved by the agency, and the Court unambiguously held that where Congress *had* expressed an intent, the agency must give effect to that intent and the "judiciary is the final authority on [such] issues of statutory construction." *Id.* at 2781-82 & n.9. *American Trucking Ass'ns, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397 (1967), dealt with the ICC's authority to "overturn past administrative rulings and practice," not Congressional limitations. *Id.* at 416.

of the Securities Exchange Act of 1934 to suspend trading in any security for up to ten days. The Court questioned the use of § 12(k) for purposes beyond "those clearly contemplated" by the statute as a "solution to virtually any other problem which might occur in the marketplace." *Id.* at 117. Continuing, the Court said this summary suspension power "was not meant to be such a cure-all" and while "[i]t provides the Commission with a powerful weapon for dealing with certain problems," its limits are "clearly and precisely defined" and "cannot be judicially or administratively extended simply by doubtful arguments as to the need" for regulation. *Id.* at 117. "If extension of the summary suspension power is desirable," the Court concluded, "the proper source of that power is Congress." *Id.*

The same limitations apply here. The Board's evasion authority is necessarily defined and limited by the scope of the Act itself. An institution which chooses to engage in activities other than those Congress has determined to implicate the purposes of the Act does not thereby "evade" the Act and thus subject itself to Board jurisdiction. A manufacturer does not "evade" the Act by financing the purchase of its products but not otherwise engaging in financial activities that would bring it within the Act's purview.[39]

The overbreadth and illogic of the Board's evasion rationale can be seen with respect to Dimension's proposal to establish and operate 31 national banks in 25 states. These institutions will be "consumer banks," di-

[39] The Board at several points implies that the BHCA gives it plenary authority to regulate the financial activities of major nonbanking corporations. *See, e.g.*, Pet. Br. 20-21. In fact, major corporations have always engaged in extensive financial activities outside the scope of the BHCA. A study recently published by the Federal Reserve Bank of Chicago showed that "[i]n 1972, at least ten nonfinancial firms had significant financial services earnings, and by 1981 this list had grown over three-fold." Pavel & Rosenblum, "Banks and Nonbanks: The Horse Race Continues," *Economic Perspective*, 4 (May/June 1985).

rected at serving the financial needs of individuals, and will not engage in the business of commercial lending. In granting preliminary approval to this proposal after extensive hearings and written submissions, the Comptroller found "that the convenience and needs of the communities involved will be best served by approval of the Dimension applications." [40] Contrary to the Board's suggestion that "nonbank banks" are not subject to necessary safeguards to ensure their safety and soundness (Pet. Br. 12, 23), the Dimension system will consist of national banks fully regulated by both the Comptroller and the FDIC.[41] Indeed, as future members of the federal reserve system, the Dimension national banks will even be subject to important Board regulations concerning reserve requirements and interest rates. 12 C.F.R. Parts 204, 217 (1985).

In these circumstances, the Dimension system is no "evasion" of the BHCA's provisions or purposes.[42] Rather, by not engaging in the business of commercial lending, the Dimension banks will simply not be the type of financial institutions—commercial banks—which Congress thought should be subject to the one statute here at issue, the BHCA. Moreover, whether the Dimension banks' investment strategy for temporarily idle funds involves commercial paper, certificates of deposit, or Treasury bills (which are not commercial loans even

[40] Decision of the Comptroller of the Currency on the Applications of Dimension Financial Corporation to Charter 31 National Banks in 25 States, at 23 (May 9, 1984) (hereinafter "Comptroller's Decision").

[41] *Id.* at 20. Moreover, the Dimension holding company itself will be subject to Comptroller regulation as an "affiliate" of a national bank. *See* 12 U.S.C. § 481 (1982).

[42] In fact, the United States District Court for the District of Columbia has found that the Dimension system does not present any substantial issues under the BHCA. *Independent Bankers Ass'n* v. *Conover*, No. 84-3201, slip opinion (Feb. 27, 1985).

under the Board's new definition (*see* note 35 *supra*)), does not alter this absence of "evasion." [43]

The Board's variations on its evasion argument further undercut its legal position. In particular, the Board claims that "there is a significant likelihood that in practice . . . a nonbank bank . . . will be tempted to provide indirectly all of the services of a commercial bank." Pet. Br. at 22, 45. Prohibiting temptation is normally considered a religious function, not a justification for a continuing and pervasive expansion of regulatory authority. If this concern were sufficient to enlarge the Board's jurisdiction, there would be no limit to the eventual extent of the Board's financial regulation and no point in Congress enacting jurisdictional limitations. Rather than support the Board, this enforcement argument merely confirms that utilizing money market and interbank instruments does not constitute a violation of the Act, and that the Board is seeking to expand its jurisdiction for reasons unrelated to those instruments.

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[43] The Board's *amici* press the Board's "evasion jurisdiction" even more enthusiastically than the Board. Brief of Conference of State Bank Supervisors, *et al.* ("CSBS") as *Amici Curiae* at 24-25; Brief of Independent Bankers Association of America as *Amicus Curiae* at 14-15. *Amici* would confer on both the Board and the federal courts almost untrammelled power to attack "adroit and unscrupulous practices," and thus "insur[e] compliance with Congress' goals even when Congress muddies the waters." CSBS Brief at 25-26, *in part quoting Florida Department of Banking and Finance* v. *Board of Governors*, 760 F.2d 1135, 1143-44 (11th Cir. 1985), *cert. pending*, No. 85-193, 54 U.S.L.W. 3100.

Amici's argument erroneously assumes *ab initio* that institutions like Dimension are in fact commercial banks and that their exclusion from the Act's coverage therefore constitutes an "evasion." That argument ignores the clear evidence that Congress never intended the Act to cover institutions that do not make commercial loans, and that the Board itself recognized for years that Dimension's proposed investment activities do not constitute "commercial loans." There is nothing "adroit and unscrupulous" about doing what the law allows.

Similarly, the Board repeatedly suggests that the existence of limited-service banks like the Dimension system is at odds with or an evasion of the Douglas Amendment to the BHCA, 12 U.S.C. § 1842(d), citing the Court's recent decision in *Northeast Bancorp, Inc.* v. *Board of Governors*, 105 S. Ct. 2545 (1985). But like the Board's regulatory authority, the Douglas Amendment's scope is coterminous with the Congressional definition of a "bank" under the BHCA. The fact that the Douglas Amendment may prohibit ownership of certain banking institutions in more than one state does not answer the question of what those institutions are. Instead, the prohibition of the Douglas Amendment, like the reach of the Board's regulatory powers, is specifically limited to those institutions defined by Congress in section 2(c) of the Act.[44]

Furthermore, the current extent of lawful interstate banking, *consistent* with the Douglas Amendment, demonstrates that the Amendment certainly is not a blanket prohibition of interstate banking activities, as the Board and its *amici* suggest.[45] The Federal Reserve Bank of

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[44] The concept that an evasion power can be used to alter a statute's meaning, contrary to its express language, was taken to its most extreme form in the recent decision of the Eleventh Circuit in *Florida Department of Banking & Finance* v. *Board of Governors*, 760 F.2d 1135 (1985), *cert. pending*, No. 85-193, 54 U.S.L.W. 3100. The court there read the "commercial loan" limitation out of the BHCA entirely, a clearly invalid result. *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

[45] The proposed Dimension system once again exemplifies the overbreadth of the Board's action when measured against the underlying purpose of the Douglas Amendment "to retain local, community-based control over banking." *Northeast Bancorp, Inc.* v. *Board of Governors*, 105 S. Ct. at 2553. Dimension is not one of the "established banking giants in New York, California, Illinois, and Texas" seeking to extend its current business across state lines. *Id.* at 2549. Rather, Dimension is a new market entrant proposing a network of consumer banks heavily oriented to the needs of the specific communities where its proposed banks would be located and whose corporate boards would have a majority

[Footnote continued]

Atlanta in 1983 surveyed the extent of interstate banking activity and concluded that consistent with the Douglas Amendment, "banking organizations are providing financial services across state lines and have been doing so for some time." [46] Terming the amount of interstate activity "prodigious," the Atlanta Federal Reserve Bank found that "domestic banking organizations control at least 7,383 interstate offices and, if we include interstate offices of foreign banking organizations, the total reaches 7,840." [47] In *Northeast Bancorp*, this Court expressly recognized the existence of "growing competition from nonbanking financial services that are not confined within state lines," noting that this was the very rationale of the state statutes the Court upheld in that case. 105 S. Ct. at 2553. Thus, the Douglas Amendment is an important piece in the regulatory framework, but it does not require or enable the Board to rewrite other provisions to reach non-BHCA banks.

As these facts and the very language of the statute demonstrate, Congress has determined that all the provisions of the BHCA, including the Douglas Amendment, should be triggered only where an institution receives demand deposits, including deposits of commercial enterprises, and engages in the business of lending those deposits back to commercial enterprises in the form of commercial loans. The Board cannot rewrite this Congressional definition either by pressing its own view that

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of their directors drawn from those very communities. Comptroller's Decision, *supra* note 40, at 2, 10-11. It should be noted that before approving this concept as fully warranted by the needs of the particular communities involved (*id.* at 23), the Comptroller specifically reviewed the banking laws of each and every state in which Dimension proposes to operate. *Id.*, Appendix.

[46] Whitehead, "Interstate Banking: Taking Inventory," *Economic Review* 1 (May 1983) (J.A. 156A).

[47] *Id.* at 20, 18 (J.A. at 172A, 170A).

the purposes of the Act would now be better served by such a redefinition and the resulting expansion of its jurisdiction, or by invoking an alleged power to prevent "evasions" by the very institutions Congress intended to exclude from the Act's provisions.

III. DECISIONS REGARDING THE SHAPE OF FINANCIAL REGULATION ARE FOR CONGRESS, AND THE BOARD SHOULD NOT BE PERMITTED TO ARROGATE THAT POWER.

The Board's arguments ultimately come down to its perceived need for more jurisdiction to deal with changes in the financial marketplace as it deems fit. However, the United States Government and other individual federal agencies have different views on the shape of financial regulation, and Congress is the constitutional arbiter for resolving these policy differences. If the Board were permitted to implement its own policy view through the simple expedient of a purported jurisdictional "interpretation," the legislative process would be distorted and congressional responsibility usurped. Even full "deference" to an expert agency cannot authorize that agency's assumption of major policy decisions properly made by Congress. *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983).

The essentially legislative nature and intent of the Board's action in attempting to redefine "commercial loans" is demonstrated by the Board's statement that its current effort to halt change in the financial marketplace was necessary "in order to avoid the preemption of Congressional discretion." Pet. App. at 61a. In 1983, the Board proposed for introduction into Congress a bill that would have imposed a moratorium on any further developments in the banking system through broadening the definition of "bank" in the BHCA. Chairman Volcker testified that "[w]e do think that the enactment of a temporary moratorium will give you [Congress] a little

breathing room." [48] Congress did not enact the Board's requested moratorium, and Senator Garn, Chairman of the Senate Banking Committee, among others, expressly disapproved of the Board's proposal.[49]

Congress having proven so intractable, the Board promulgated the Regulation Y amendments shortly thereafter to provide Congress "the discretion" that apparently Congress does not want or, more accurately, has not exercised in the particular manner urged by the Board. But the Board is not Congress, and the Board cannot preserve or direct Congressional discretion by limiting market developments in areas where Congress has not granted it the authority to act.[50] As stated by the FDIC in response to the Board's Dreyfus Letter:

> We firmly believe that Congress is the appropriate authority to reassess the statutory distinctions among banking institutions, thrifts, securities firms, other providers of financial services and commercial firms in general, and to resolve the underlying question of

[48] *Moratorium Legislation and Financial Institutions Deregulation: Hearings on S.1532, S.1609 and S.1682 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. 140 (1983).

[49] *See id.* at 83 (remarks of Senator Garn). The Administration also opposed the Board's moratorium. *Id.* at 65 (testimony of Secretary Regan).

[50] Courts in the past have had to guard against the Board ignoring plain statutory language to further its own notions of the public interest. *See American Bankers Association* v. *Connell*, 686 F.2d 953, 954 (D.C. Cir. 1979) (striking down Board regulations whose effect was "to rewrite the language of statutes"); *Patagonia Corp.* v. *Board of Governors*, 517 F.2d 803, 813 n.11 (9th Cir. 1975) ("Congress surely did not intend that the Board would be empowered to expand or constrict the statutory definition . . . in accordance with the Board's conception of regulatory needs.") *Western Bancshares, Inc.* v. *Board of Governors*, 480 F.2d 749, 752 (10th Cir. 1973) (striking down Board action that court determined was tantamount to legislating, "a function vested exclusively in the legislative branch").

> the activities in which banks and bank holding companies shall be permitted to engage.

J.A. at 91A.

"The underlying question" noted by the FDIC has in fact been the subject of an ongoing policy debate among federal regulators and others throughout the banking and financial services industry. While the Board speaks darkly of the "possibly dangerous alteration of the banking structure" (Pet. Br. 24), the Comptroller and the FDIC have expressed the view that increased competition by new providers of financial services is in the public interest.[51] The Assistant Attorney General for the Antitrust Division expressed the similar view in 1983 that "increasing the potential for new entry" would aid competition in the banking industry and concluded that "the prevention of undesirable levels of concentration can and should be addressed through the antitrust laws, not through blanket prohibitions on interstate banking." [52] Indeed, even one of the Board's Governors, Gov-

[51] The Comptroller's Office in 1980 issued a policy statement affirming the "view that the convenience and needs of communities for banking services are best served by a high degree of competition and with the Office's view that qualified persons should have the maximum opportunity to organize and operate a national bank." 45 Fed. Reg. 68603, 68603 (Oct. 15, 1980). The Comptroller found the chartering of the Dimension banks consistent with this policy. Comptroller's Decision, *supra* note 40, at 23.

See also Statement of William M. Isaac, Chairman, FDIC, *Competitive Equity in the Financial Services Industry: Hearings on S.2181 and S.2134 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, Pt. III, 98th Cong., 2d Sess. 1274, 1280 (1984) (supporting general framework of deregulation and "favor[ing] a system without artificial barriers to lock firms into and out of markets").

[52] Testimony of William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice, *Financial Services Industry-Oversight: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. 408, 414 (1983).

ernor Rice, has admitted that limited-purpose banks "would have the attractive competitive feature of requiring de novo entry into new markets. New entrants would have to compete for market share. . . ." [53]

Moreover, increased competition does not threaten the health of existing banks. As Governor Rice further acknowledged, "[c]ontrary to frequently expressed fears, de novo entry by large corporations does not harm the existing banks in a market." [54] This position was confirmed in a recent report by the staff of the Federal Reserve Bank of Chicago. According to this report, "the banking industry has shown an amazing degree of resiliency in the face of" competition from nonbanking providers. The authors concluded that fears of "immediate danger to the banking industry . . . are unwarranted." [55]

Congress thus has before it a variety of views on which changes in banking and financial services should be encouraged, which should be deterred, and how responsibility for regulation of the country's financial services industry should be allocated. Congress has actively monitored this industry in the past and has acted when it has determined that changes in the governing regulatory structure are necessary. Congress has enacted three ma-

[53] E. J. Rice, Remarks before the National Association of Urban Bankers, "Progress Towards Interstate Banking" 9-10 (June 21, 1984).

[54] *Id.* at 10. New entrants may also be able to fill needs not met by existing institutions. For example, even in Iowa, a state that previously has strongly favored local banks, a recent editorial in the Des Moines Register suggested that restrictions on interstate banking may be responsible for the severely limited availability of capital in Iowa. The editorial concluded: "Perhaps a branch of a major financial institution with a diversified base could serve the community better than a local bank." Des Moines Register, Aug. 1, 1985, at 10A, col. 1.

[55] Pavel & Rosenblum, *supra* note 39, at 15.

jor banking statutes in recent years,[56] and its close supervision of developments in the industry continues. In this session alone at least ten bills have been introduced concerning financial regulation.[57]

The Court has made clear in recent years that policy questions of the type raised by the Board in this case must be resolved by Congress. Whatever the dictates of wise policy, "that policy must be implemented by Congress." *BankAmerica Corp.* v. *United States,* 462 U.S. at 133. In particular, "[i]f changes in economic factors or considerations of public policy counsel" the extension of a statute's reach, "it is a simple matter for Congress to say so clearly." *Id. Accord United States* v. *Lorenzetti,* 104 U.S. 2284, 2292 (1984). Similarly, if developments in the marketplace have really resulted in any problems in the BHCA's current definition of a "bank," the power to address that purported problem resides solely in Congress, for "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress." *Sedima, S.P.R.L.* v. *Imrex Co.,* 105 S. Ct. 3275, 3287 (1985).

Congress, having established the bounds of the Board's jurisdiction under the BHCA through the definition of a "bank," necessarily withheld from the Board the power to redefine that term. Because the Board cannot arrogate the responsibility to expand its own jurisdiction, the Board should not now be allowed by administrative fiat to compel affirmative Congressional action to restore a

[56] Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469; Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132; Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

[57] H.R. 15; H.R. 20; H.R. 52; H.R. 688; H.R. 1276; H.R. 1514; H.R. 1923; H.R 2099; H.R. 2212; H.R. 2707.

regulatory *status quo* upset by the Board's action.[58] The Board's current effort to do precisely that is particularly inappropriate in view of the fact that the Board's new legal interpretation of the BHCA is an abrupt and major departure from previous constructions of the Act and, therefore, will have severe consequences for those who relied on the earlier constructions, as well as consequences for other agencies and the public which cannot readily be undone by Congress. *See BankAmerica Corp.* v. *United States*, 462 U.S. at 132; *J. W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 592-94 (1978).

CONCLUSION

For the foregoing reasons, respondents Dimension Financial Corporation, *et al.* respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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[58] The full extent of this problem is illustrated by the fact that the Board's amended regulation would require affirmative Congressional action even if Congress merely wanted to acquiesce in the Board's position. Specifically, any BHCA "bank" is required by the Act to obtain FDIC insurance, 12 U.S.C. § 1842(e) (1982), but the Board's new definition of "bank" would include certain institutions, such as some industrial loan companies, which are *ineligible* for FDIC insurance. Remarkably, the Board "resolved" this dilemma by dictating to Congress a two-year deadline in which to pass new legislation ending the statutory conflict created by the Board's amended regulation. Pet. App. 44a.